United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-1029

In the
UNITED STATES COURT OF APPEALS
For the Second Circuit

Docket No. 74-1029

UNITED STATES OF AMERICA,
Plaintiff-Appellee

vs.

JOHN P. CLEARY
Defendant-Appellant

On Appeal From The United States District Court
For The District of Vermont At Criminal
Action No. 73-37

BRIEF FOR APPELLANT, JOHN P. CLEARY

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PRELIMINARY STATEMENT

This is an appeal by JOHN P. Cleary, Defendant, who was tried by a jury in the United States District Court, District of Vermont, the Honorable James W. Holden, presiding, and found guilty on two

counts of selling or delivering firearms by a licensed dealer to a person, who the licensed dealer knew or had reasonable cause to believe did not reside in the State in which the licensee's place of business was located. 18 U.S.C.A. 922 (b).

ISSUES PRESENTED

1.) Should the Judgment of the District Court be vacated and the case of the UNITED STATES OF AMERICA v. JOHN P. CLEARY be remanded for a new trial in that the District Court erroneously directed the jury to find a material issue of fact against the Defendant ?

2.) Should the Judgment of the District Court be reversed and Judgment entered for the Defendant in that the District Court erred in denying the Defendant's Motion for Judgment of Acquittal made at the close of the Government's case ?

3.) Did the fact that the Defendant proceeded with his evidence, after the erroneous denial of his Motion for Acquittal made at the close of the Government's case, and the fact that the Defendant in presenting his case filled the otherwise fatal evidenciary gap in the Government's case, constitute a waiver of the Trial Court's error in denying the Defendant's Motion made at the close of the Government's case ?

STATEMENT OF THE CASE

John P. Cleary was indicted by a Grand Jury for alleged violation of 18 U.S.C.A. Sec. 922 (b), the illegal selling of firearms by a licensee to non-residents. The Indictment consisted of two counts. The crimes allegedly occurred on May 3, 1973.

The case came on for trial by jury on July 24, 1973, in the Federal District Court, District of Vermont, at Brattleboro, Vermont, and said trial resulted, on July 28, 1973, in a verdict of guilty against the Defendant on both counts of the Indictment. The post-conviction Motions of the Defendant, John P. Cleary, for Judgment Acquittal, or, alternatively, for a new trial were denied by the Honorable James W. Holden.

STATEMENT OF FACTS

On March 23, 1973, Special Agent Christopher M. Cuyler of the Bureau of Alcohol, Tobacco and Firearms, visited the Defendant's place of business in Williston, Vermont. The Defendant, John P. Cleary, is a federally licensed firearms dealer. On the visit of March 23, 1973, Agent Cuyler observed a firearms transaction involving a Mr. Hall and a Mr. Titcum. It appeared to Special Agent Cuyler that Mr. Hall was a non-resident and that the shotgun in question was being purchased for the beneficial use of Mr. Hall. Mr. Titcum, a Vermonter, executed the Firearms

Transaction Record, an official federal form, Mr. Hall chose the shotgun and indicated the serial number that he wished inscribed on the shotgun. Mr. Hall provided Mr. Titcum with the money and Mr. Titcum paid Mr. Cleary for the firearm. Special Agent Cuyler told the Defendant that the Defendant was wrong "in selling the firearm to Mr. Titcum knowing it was for a friend" (T. 112).

As a result of the transaction of March 23, 1973, Special Agents Richard C. Dotchin and Paul B. Flynn, both non-residents of the State of Vermont and acting in an undercover capacity, visited the Defendant's place of business on April 24, 1973. On April 24, 1973, Special Agent Dotchin attempted to purchase a 22 caliber semi-automatic pistol from a person he referred to as "Mr. Cleary", but who was never identifed as the Defendant, and who was never identified by Special Agent Dotchin as being John P. Cleary, the licensee, the Defendant, or the person charged and on trial in the court room.

The person with whom Special Agent Dotchin was dealing, whom he referred to as "Mr. Cleary", asked him if he were a Vermonter or a Vermont student, and when Special Agent Dotchin stated he was not, the person who he referred to as "Mr. Cleary", stated that it was against Federal law for him to sell to a non-

resident a gun and that if he wished the gun he would have to get a Vermont resident to buy it. Special Agents Dotchin and Flynn indicated at that time that "Harry" would probably buy the gun. The Agents were asked if this "Harry" was 21 years old.

On May 3, 1973, Special Agents Dotchin and Flynn returned to the Defendant's place of business accompanied by Harold Anderson, Jr., of the Vermont State Police. Trooper Detective Anderson was a Vermont state resident. Special Agent Dotchin selected a .380 Mauser pistol. Special Agent Flynn selected a 38 Special, Smith & Wesson revolver. Trooper Detective Anderson executed Firearms Transaction Records with respect to each of these weapons after displaying a valid Vermont drivers license. All three of the officers were in civilian clothing and acting in an undercover capacity.

All three of the officers referred to the person with whom they dealt in the transaction as "Mr. Cleary". None of the three officers, Dotchin, Flynn and Anderson, introduced any testimony that the person with whom they dealt on May 3, 1973, had been in any way identified to them as "John P. Cleary", or "Mr. Cleary", or the licensee. None of the three identified the Defendant as the person they dealt with in the Powder Horn Gun Shop on May 3, 1973.

The Government's final witness was Mr. Stephen Titcum, who testified with respect to the transaction of March 23, 1973. The Government rested its case and the Defendant moved for a Judgment of Acquittal

The Defendant proceeded with his defense, and, in the course of his defense, it was developed that the Defendant was the person involved with Special Agents Dotchin and Flynn and Trooper Detective Anderson on May 3, 1973.

There was abundant evidence that persons other that the Defendant sold firearms at the Defendant's place of business and completed Firearms Transaction Records.

The Defendant testified that he believed that he could properly sell firearms to a Vermont resident even if he suspected that such firearms were for the beneficial use of non-residents. He testified that he believed he was selling the guns "technically" to Trooper Detective Anderson, a Vermont resident. The Special Agents, Dotchin and Flynn, and State Trooper Anderson all testified that "Mr. Cleary" had instructed State Trooper Anderson as to how he (Trooper Anderson) should make out a bill of sale in duplicate, retaining a copy, if he disposed of the guns.

I

THE TRIAL COURT ERRED IN DIRECTING THE JURY THAT IT MUST FIND THAT THE DEFENDANT SOLD THE FIREARMS IN QUESTION TO THE PERSONS NAMED IN THE INDICTMENT

The principle defense of the Defendant upon trial was that he sold and delivered the firearms in question to a bona fide Vermont resident, Harold Anderson, Jr. The sense of this defense was that the Defendant believed that he was in compliance with the law if he made a firearms sale, evidenced by a Firearms Transaction Record, to a Vermonter, even if that Vermonter had the obvious intention of transferring the firearm to a non-resident. In other words, the Defendant's principle defense was that he believed it was proper for him to sell and transfer to a Vermonter who was acting as the agent for disclosed or partially disclosed non-resident principals.

Regardless of the validity of the Defendant's belief, two basic, factual issues were raised for the jury's consideration:

> 1. Did the Defendant made a "technical" sale to Anderson (a Vermonter) rather than sales to Dotchin and Flynn (non-residents) ?
>
> 2. Did the Defendant believe that he was making the sales to Anderson (the Vermonter) in compliance with the law even if such was not the legal result of the transaction ?

If the jury believed that there was a sale to Anderson, it would have properly brought back a verdict of "not guilty". Similarly, the jury could have found under the evidence that the Defendant believed he was properly selling to Anderson by virtue of the Firearms Transaction Records, while accepting the Government's position that Dotchin and Flynn were the actual legal purchasers. In such case, the jury would have found that there was no "knowing sale" and no crime. There was ample evidence in the record to sustain either such finding. Both of these issues were issues of fact in dispute, and for the jury.

The Trial Court, in its charge, took both of these disputed factual issues away from the jury, in effect directing the jury's verdict with respect to these issues. The Trial Court charged, at first, as follows:

> As to the element of the second element which is in dispute, I instruct you that you must find, beyond a reasonable doubt, that the Defendant sold the firearm in question to the named persons and that he delivered the firearm to the persons so named (T. 803).

In employing the above quoted language, the Court in effect directed the jury that it must find that there were sales to Dotchin and Flynn, the non-resident agents. If the Court had preceded the above quoted charge by any conditional language,

such as "in order to bring back a verdict of guilty you must ...", or "unless you find .... you must bring back a verdict of 'not guilty' ", the issue would have been left for the jury to decide. It has been long and well established that such a "partial direction of a verdict" is improper and constitutes reversible error. Thus, it has been held that an instruction deciding a material fact issue adversely to the Defendant is regarded as a partially instructed verdict of guilty and is prohibited by the rule stating that the Trial Court has no power to direct a verdict of guilty. Mims v. U.S., 375 F. 2d 135. In Bryan v. U.S., 373 F. 2d 403, The Circuit Court reversed a judgment of guilty because of the Trial Court's refusal to submit the issue to the jury of whether a weapon was a "firearm" within the meaning of the Statute. The reversal was based upon the proposition that such refusal constituted a partial direction of verdict.

The rule that a directed verdict of guilt is invalid is to be enforced "no matter how conclusive evidence in case may be". U.S. v. Hayward, 420 F. 2d 142. In the Hayward case, above cited, the court held that the rule against directed verdicts of guilt, included situations in which the trial court's instructions fell short of directing a guilty verdict, but nevertheless had the effect of so doing by eliminating relevant issues from the jury's

consideration.

The Trial Court, in the instant case, went on and charged as follows:

> I further instruct you that in applying the words 'Sell and Deliver,' you must use your good common sense and not apply any technical interpretation of those words to them. To 'sell' of course, means to transfer to another for a price. Usually to be paid in money. And, to 'deliver' means to transfer possession voluntarily from one person to another.
>
> In the case of a sale from the buyer to the seller, the fact that a Vermont resident actually signed the Firearms Transaction Records, does not necessarily mean the gun was technically sold to him. You must examine all of the circumstances surrounding the transaction, including who negotiated the purchase, provided the funds, and took possession and delivery and for whom the beneficial use of the weapon was intended, in order to determine to whom the sale was actually made.

(T. 803-804).

In the above quoted portion of the Court's charge, the Court furthered its direction of the verdict on the issue of "sale". The Court instructed the jury that it could not find a "technical" sale. The Court instructed the jury that the persons to whom the sale was made were the persons who negotiated the purchase, provided the funds, took possession and delivery and "for whom the beneficial use of the weapon was

intended", in effect re-enforcing the first paragraph of its charge.

The overall sense of the charge with respect to the so-called "second element" was then that the jury was permitted to consider whether or not there was any sale or delivery of firearms, a fact that was never in dispute, but that the jury was instructed to find that if any sale took place that the sale took place to the persons named in the Indictment. Furthermore, the Court took from the jury's consideration the entire issue of whether the Defendant <u>believed</u> that he was properly selling to Anderson, and was thus innocent of a "knowing sale".

Upon completion of the charge, the Defendant objected to the charge concerning the so-called "second element". The transcript indicates that the objection was very garbled: "..... and in your instructions on the second element of the crime or criminal act in that you indicated to the jury that 'deciding' of law does not technically mean a sale was the question that they are deciding." (T. 811). The Defendant realizes that he can not collaterally attack the transcript, and that he is bound by the record. In making his objection to the charge, the Defendant was attempting to point out to the Court that the Court had taken away from the jury and had "decided" as a matter of law that the jury could not find a technical sale. Even if the Defendant's

language was as inarticulate and garbled as the transcript reflects, it was certainly abundantly clear to the Trial Court that the Defendant was objecting to "your instructions on the second element of the crime.....". The Court knew that the Defendant was objecting to its charge with respect to the second element, that is, sale and delivery. The Court did not inquire or question the apparently garbled and inarticulate objection, or seek in any way to determine the basis of or the nature of the Defendant's objection.

The case was then submitted to the jury with the major and most critical factual issue of defense directed by the Court against the Defendant. This partial direction of guilt constitutes reversible error. Mims v. U.S., 375 F. 2d 135; Bryan v. U.S., 373 F. 2d 403; Strauss v. U.S., 376 F. 2d 416; Bearden v. U.S., 403 F. 2d 782.

After verdict, the Defendant filed a "Motion for Judgment of Acquittal Notwithstanding The Verdict or, In Alternative For A New Trial". Paragraph 3 of the Motion reads as follows:

> The Court erred in instructing the jury that they could not find that a sale had technically been to the "individual" who signed form #4473.

The Defendant argued the points raised herein on pages

4 and 5 of the Supplemental Transcript.

Thus it appears that the Trial Court in its instructions erroneoulsly directed a verdict against the Defendant's major factual defense; that the Defendant objected to the charge at the proper time; that the Trial Court ignored the Defendant's objection; that the Defendant urged the same objection in his Motion for post verdict relief; and that said objection was again denied.

II

THE DISTRICT COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR ACQUITTAL MADE AT THE CLOSE OF THE GOVERNMENT'S CASE

The Defendant moved for acquittal at the close of the Government's case upon the grounds that the Government had failed to bring forth sufficient evidence to satisfy the requisite elements of the crime (T. 338-339). This motion was renewed on the following morning in more detail and specifying the particular insufficiency in the Government's case (T. 367-369). Both of these motions were denied (T. 339, 369).

It scarcely requires argument that ".....the evidence, to warrant a conviction, must identify the accused as the person who committed the crime charged". 23 C.J.S., Sec. 920, p. 644 and cases therein cited.

In the instant case, the Government called five witnesses in presenting its case in chief. The first witness was Special Agent Christopher M. Cuyler. The witness Cuyler identified the Defendant as John P. Cleary, as a licensee, and as being present in the court room (T. 101-108). He also identified the Defendant as being present at the Powder Horn Gun Shop on March 23, 1973 (T. 105-113). At no time did the witness Cuyler attempt to identify

the Defendant as the person who allegedly sold guns on May 3, 1973. No testimony was elicited from the witness Cuyler from which a jury could have properly found or inferred that the Defendant was the person involved in the alleged sales to non-residents on May 3, 1973.

The second witness was Special Agent Richard C. Dotchin. Mr. Dotchin at no time presented any evidence whatsoever from which a jury could have properly found or inferred that the Defendant was the person involved in the alleged sales to non-residents on May 3, 1973 (T. 149-216).

The third Government witness was Special Agent Paul B. Flynn. Mr. Flynn likewise did not present any testimony from which a jury could have properly found or inferred that the Defendant was the person involved in the alleged sales to non-residents on May 3, 1973 (T. 216-265).

The fourth Government witness was Vermont State Police Detective Trooper Harold Anderson, Jr. No evidence of any kind whatsoever was elicited from Mr. Anderson from which a jury could have properly found or inferred that the Defendant was the person involved in the alleged sales to non-residents on May 3, 1973 (T. 265-306).

The fifth and final Government witness was Stephen Titcum. Mr. Titcum did identify the Defendant as Mr. Cleary (T. 309), and did identify Mr. Cleary as being present and involved during the gun sale of March 23, 1973 (T. 312-313). Mr. Titcum did not furnish any evidence of any kind whatsoever from which a jury could have properly found or inferred that the Defendant was the person involved in the alleged sales to non-residents on May 3, 1973.

After introducing these five witnesses, the Government rested its case. At the close of the Government's case there was not even a bare scintilla of evidence that the Defendant was the person involved in the transactions of May 3, 1973.

All of the three witnesses to the events of May 3, 1973 (Flynn, Cuyler and Dotchin) referred to the alleged seller of May 3, 1973, as "Mr. Cleary", but at no time did any of the three witnesses testify that such alleged seller was in any way, shape or manner identified to them as "John P. Cleary", or "Mr. Cleary", and at no time was any relationship drawn between the man they allegedly dealt with on May 3, 1973, and the Defendant, John P. Cleary, then on trial.

The Defendant promptly moved for acquittal under Federal Rules of Criminal Procedure, Rule 29 (a) (T. 338-339). It was not encumbent upon the Defendant to specify the particular grounds of

his motion. Huff v. U.S., 273 F. 2d 56; U.S. v. Jones, 174 F. 2d 746. It was the duty of the Court to order a Judgment of Acquittal at that time of the grounds that the Government had failed to produce sufficient evidence to sustain a verdict in its favor. U.S. v. Day, 438 F. 2d 121; U.S. v. Wininger, 427 F. 2d 1128; Cephus v. U.S., 324 F. 2d 893; Montoya v. U.S., 402 F. 2d 847. While there was some early split in authority concerning the above proposition, the proposition is sustained by the explicit language of Rule 29 (a). As is stated in 2 Wright, Federal Practice and Procedure, Sec. 463, p. 245:

> The motion for judgment of acquittal at the close of the Government's case implements "the requirement that the prosecution must establish a prima facie case by its own evidence before the defendant may be put to his defense." The rule provides that the court "shall order the entry of judgment of acquittal * * * if the evidence is insufficient to sustain a conviction of such offense or offenses." Accordingly, its requirements are mandatory. Rule 29(b), permitting reservatior of a decision of a motion for judgment of acquittal, is limited in terms to a motion at the close of all the evidence. The Court must decide a motion made at the close of the Government case at that time, and may not reserve decision.

The same proposition is reported by 8 Moore's Federal Practice, 2d Ed., Sec. 2903, p. 29-7:

> Although Rule 29(a) theoretically makes an acquittal mandatory if the Government has failed to prove a prima facie case, the general practice of trial judges is to, in effect, "reserve" decision on the motion by denying it. This then permits gaps in the Government's case to be filled in by the Defendants.

The proposition is further sustained by ABA, "Project on Minimum Standards for Criminal Justice-Trial by Jury", Tent. Dr. 1968, Sec. 4.5(b).

The Court, without the benefit of any argument or time for review or reflection, denied the Defendant's motion for judgment of acquittal (T. 339). This denial by the Trial Court constitutes error and at least in the absence of anything else, is reviewable upon appeal. U.S. v. Day, 438 F. 2d 121; Austin v. U.S., 382 F. 2d 129; U.S. v. Wininger, 427 F. 2d 1128; Rowley v. U.S., 191 F. 2d 949; Montoya v. U.S. 402 F. 2d 847.

The defendant went forward, for the balance of the afternoon, with the evidence of Alben Oliver (who likewise did not identify the Defendant as being involved with the events of May 3, 1973), and on the following morning, before commencing trial, renewed his motion for acquittal as follows:

> MR. CLEVELAND: Your Honor, the Defendant moves for a Judgment ofAcquittal because of the Government's failure to identify

the Defendant as the John P. CLEARY that has been named in the testimony of the Government's witnesses.

During their testimony, Special Agent Richard DOTCHIN, Paul FLYNN and Detective Trooper ANDERSON never identifed the Defendant as the John CLEARY mentioned in their testimony.

The testimony of Special Agent Richard DOTCHIN, Paul FLYNN and Detective Trooper Harold ANDERSON was the only testimony introduced by the Government before it rested, relating to the alleged sale of firearms in the indictment, on May third, 1973.

Both counts of the indictment are based on the sale of firearms alleged to have occurred on May third, 1973. At no time has the Government identified the Defendant as the John P. CLEARY named in the indictment.

(T. 367-368)

This particularized motion was also denied (T. 369). The Government, in its argument concerning the renewed motion, referred to the testimony of witnesses Cuyler and Titcum and to the handwriting which appeared on the various Firearms Transaction Records. The Defendant pointed out to the Trial Court that these witnesses identified the Defendant in March or early April with no evidentary link to May 3, 1973; and that the Motion was addressed to the subject matter and date in the indictment, May 3, 1973. With respect to the Government's argument concerning "handwriting", there was never any attempt made to identify the handwriting on

any of the Firearms Transactions Records.

Thus, the record discloses that the Trial Court was twice urged by motion for judgment of acquittal to comply with the mandate of Rule 29 (a): "the Court on motion of a Defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed, if the evidence is insufficient to sustain a conviction of such offense or offenses." [Emphasis is added.]

Although such step was legally un-necessary, the Defendant specified the particular grounds for his motion and afforded the Trial Court the opportunity to correct its error. In again denying the motion, the Trial Court confirmed, if not compounded, its original error. The motion was renewed after the close of all of the testimony and after verdict.

The question next arises as to whether the Trial Court's error was "cured" or rendered "harmless" by reason of the so-called "waiver doctrine". Because of the complexity and importance of this question, it is briefed herein as ARGUMENT III, below.

III

THE FACT THAT THE DEFENDANT PRESENTED EVIDENCE AFTER THE GOVERNMENT RESTED ITS CASE AND THAT SUCH EVIDENCE CURED THE INSUFFICIENCY IN THE GOVERNMENT'S CASE DOES NOT PRECLUDE REVIEW OF THE TRIAL COURT'S DENIAL OF THE DEFENDANT'S MOTION FOR ACQUITTAL MADE AT THE CLOSE OF THE GOVERNMENT'S CASE

It is acknowledged at the outset that a substantial majority of the Courts of Appeals has held that a defendant "waives" his Motion for Acquittal made at the conclusion of the Government's case if he proceeds with his evidence, and/or that review of the sufficiency of the Government's case is expanded to encompass the entire record, including the defendant's case.

While the waiver doctrine undoubtedly represents the present majority position, it has been the subject of serious criticism and attack. Wright, Federal Practice and Procedure, Vol. 2, Sec. 463; Moore, Moore's Federal Practice, 2nd Ed. Vol. 8 Sec. 29.05; "The Motion For Acquittal: A Neglected Safeguard" (1961) 70 Yale L.J. 1151. Wright, op. cit., p. 247 states:

> This waiver doctrine has come under heavy attack and there are signs that it may be crumbling. In several cases Courts have been at pains to consider the sufficiency of the evidence at the time the motion was made after the Government rested. In the District of Columbia Circuit, the rule seems to be abandoned entirely and the court does

not consider later evidence in determing whether the motion should have been granted at the close of the prosecution case. The criticism of the waiver doctrine rests on the view that it "seriously limits the right of the accused to have the prosecution prove a prima facie case before he is put to his defense", and that it "was imported from civil into criminal trials without considering the demands of our accusatorial system of criminal justice".

Wright's comments concerning criticism of the waiver doctrine are echoed and greatly expanded in Moore, op. cit., pp. 29-13, 29-14, 29-18 and 29-19 respectively:

> Rule 29 (a) provides that if the evidence is insufficient to sustain a conviction the court 'shall' order an acquittal. Theoretically, then, the court may not reserve decision on a motion for acquittal, as it may on such a motion made at the close of all the evidence. Practically, however, the court may accomplish the same result by simply denying the motion. Denial places defendant in the dilemma of resting without offering any evidence, thus risking a conviction, or putting in evidence which might result in filling the gaps in the government's case.
>
> The waiver doctrine has at least a surface appearance of unfairness, and while no court has yet repudiated it, there are signs pointing toward its erosion. The process of erosion probably originated with a broadside attack on the doctrine which appeared several years ago in the Yale Law Journal.
>
> As long as there is no effective appellate review of motions for acquittal, the inevitable cautionary tendency of trial judges will result in continued denial of relief at this stage of the trial and render the motion meaningless. It is doubtful whether any measure short of outright abolition of the waiver doctrine will permit effective review and will reverse this tendency. [Emphasis added.]

It is recognized that this Court has followed the majority view since 1948, U.S. v. Goldstein, 168 F. 2d 666, 668-671, long before the attacks on the waiver doctrine and before the evolution of a "minority view" in the Federal appellate system. Franklin v. U.S., 330 F. 2d 205; Powell v. U.S., 418 F. 2d 470; U.S. v. Bethea, 442 F. 2d 790. The Defendant in the present argument urges this Court to abandon the waiver doctrine and adopt a doctrine that will provide for an effective appellate review for motions of acquittal under Rule 29 (a).

There is a basic inconsistency, if not outright conflict, between the waiver doctrine and the implicit purpose of Rule 29.

The motion for acquittal at the close of the Government's case tests the legal sufficieny of the Government's case, and a defendant need not offer a defense until and unless the Government has presented competent evidence sufficient to take its case to the jury. 9 Wignore, Evidence, (3rd Ed.), Secs. 2487, 2494 and 2511. Rule 29 (a) directs (not "authorizes" but "directs") the Trial Court to order a Judgment of Acquittal if the Government's case is legally insufficient. The motion for acquittal is to protect the defendant from the necessity of introducing evidence and from the perils of a jury verdict. Moore, Moore's Federal Practice,

(2 ed.), Vol. 8, Sec. 29.02, pp. 29-6 and 29-7.

It is constantly alleged by various legal authorities that trial courts tend to deny, as a matter of course and with a minimum of deliberation, motions for acquittal made at the close of the Government's case. Moore, op. cit., p. 29.13, 29.18; Wright, op. cit., Sec. 461, p. 243. Upon reflection, this commonly made allegation is shocking, it is actually a charge that many trial courts deliberately ignore the purpose of Rule 29 and the duty imposed by Rule 29. There is ample evidence that such charges of judicial dereliction of duty are well founded. The very fact that the waiver doctrine is so often invoked by Federal Courts of Appeals bears evidence that the Federal Trial Courts have tended to deny Rule 29 motions made at the close of the Government's case without serious and sincere judicial evaluation. The only other possible hypothesis is absurd: that Federal trial judges are unable to determine whether there is competent evidence to make out a prima facie case and whether the essential elements of a crime or offense are covered by the evidence.

In case after case, Courts of Appeals have determined that the District Court erred in denying a Motion for Acquittal at the end of the Government's case, but that such error was "harmless"

because the Defendant "voluntarily" introduced testimony that supplied the missing evidenciary links. U.S. v. Cashio, 420 F. 2d 1132; Colella v. U.S., 360 F. 2d 792; U.S. v. Rosengarten, 357 F. 2d 263; U.S. v. Kenny, 236 F. 2d 128; T'Kach v. U.S., 242 F. 2d 937; U.S. v. Thayer, 209 F. 2d 534; Cline v. U.S., 395 F. 2d 138; Benchwick v. U.S., 297 F. 2d 330; Johns v. U.S., 227 F. 2d 374. The Appellate Courts that follow the waiver doctrine are, then, in the position of actively encouraging the pro forma denial of Motions for Acquittal made at the close of the Government's case, because postponement of an effective ruling by denial can be cured in alternate ways: If the defect in the Government's evidence is not cured by the Defendant, the Trial Court can grant a renewed motion after the close of all of the evidence or after verdict. If the Defendant has supplied the missing evidenciary links and thus stands self convicted, the Trial Court's original error is "cured" and any effective Appellate review of the Rule 29 Motion is destroyed. Herein lies the inconsistancey between Rule 29 and the waiver doctrine:

Rule 29 (a) specifically provides for Motions for Judgment of Acquittal at the close of the Government's case. The reasons for this provision are based upon the fundamental concepts of the accusatorial system of criminal justice, the prosecution's burden of

proof and the defendant's presumption of innocence. A defendant need not offer a defense of any kind until and unless a prima facie case is made out against him. Watts v. Indiana, 388 U.S. 49, 54. It is not necessary to go as far as the New Jersey Court and state that the waiver doctrine comes "perilously near compelling the accused to convict himself". State v. Bacheller, 89 N.J.L. 433, 436, 98 A. 829, 830. It is sufficient to say that Rule 29 (a) provides a method whereby a defendant can remove himself from legal jeopardy at the time when it becomes apparent that the Government has failed in its accusatorial burden, and that the waiver doctrine is inconsistent with Rule 29 in that (1) it results in the pro forma denial of Rule 29 (a) Motions at the close of the prosecution's evidence, and (2) it prevents effective judicial review of such denial.

There are many other cogent and persuasive arguments that have been directed against the waiver doctrine. These include:

> 1.) The waiver doctrine actually encourages prosecutors to bring charges without adequate evidence and/or preparation in the hope of compelling the accused to testify and fill the evidenciary gaps.
>
> 2.) Where such Motion for Acquittal is erroneously denied, the defendant is compelled to defend himself before a prima facie case is established, and the prosecution is thus relieved of its basic burden of proof.

3.) A defendant must either waive the right of judicial review of "waive" the right to offer a defense. If he rests his case without evidence, it is almost certain that he will be convicted by a jury.

4.) Where the defendant's case supplies the missing evidenciary gap, the appeal courts invoke the waiver doctrine as an expedient to prevent the discharge of a guilty defendant.

5.) The waiver doctrine reduces the precision of criminal justice.

6.) The waiver doctrine promotes an inquisitorial criminal system of justice as opposed to the accusatorial system of justice. (This argument is closely related to the "self-incrimination" position stated in State v. Bacheller, Id.)

7.) The waiver doctrine, in practice, permits the trial court to "reserve" ruling on the Motion for Acquittal at the close of the Government's case by denying it.

The above, along with many other arguments, are discussed in considerable detail in "The Motion for Acquittal: A Neglected Safeguard", 70 Yale L. R. 1151.

The waiver doctrine has apparently been rejected in Hawaii under a Rule of criminal procedure patterned after the virtually identical to Rule 29. This Court is referred to a beautifully reasoned and organized dissent by Mr. Justice Levinson. State v. Rocker, 475 P. 2d 684, 691. The doctrine has been rejected in England. Regina v. Abbott, 2 All E. R. 899. The waiver doctrine appears to be weakening in the Eighth Circuit.

U.S. v. Burton, 472 F. 2d 757.

The philosophy underlying the waiver doctrine has been denounced by the Supreme Court of the United States in Green v. U.S., 355 U.S. 184. The reasoning of Mr. Justice Black in Green v. U.S., Id., would appear applicable to the waiver doctrine. The facts were that petitioner was indicted and tried in a federal court for first degree murder. The judge instructed the jury that it could find him guilty of either first degree murder or second degree murder. The jury found him guilty of second degree murder, and its verdict was silent on the charge of first degree murder. The trial judge accepted the verdict, entered judgment, dismissed the jury and sentenced petitioner to imprisonment. On appeal, his conviction was reversed and the case was remanded for a new trial. On remand, petitioner was tried again for first degree murder under the original indictment, convicted of first degree murder and sentenced to death, notwithstanding his plea of former jeopardy.

On pages 191-192, Mr. Justice Black states as follows:

> Government contends that Green "waived" his constitutional defense of former jeopardy to a second prosecution on the first degree murder charge by making a successful appeal of his improper conviction of second degree murder. We cannot accept this paradoxical contention. "Waiver"

is a vague term used for a great variety of purposes, good and bad, in the law. In any normal sense, however, it connotes some kind of voluntary knowing relinquishment of a right. Cf. Johnson v. Zerbst, 304 U.S. 458. When a man has been convicted of second degree murder and given a long term of imprisonment it is wholly fictional to say that he "chooses" to forego his constitutional defense of former jeopardy on a charge of murder in the first degree in order to secure a reversal of an erroneous conviction of the lesser offense. In short, he has no meaningful choice. And as Mr. Justice Holmes observed, with regard to this same matter in Kepner v. United States, 195 U.S. 100, at 135; "Usually no such waiver is expressed or thought of. Moreover, it cannot be imagined that the law would deny to a prisoner the correction of a fatal error, unless he should waive other rights so important as to be saved by an express clause in the Constitution of the United States."

Mr. Justice Black on pages 193-194 analyzes the Government's claim of waiver with the following language:

> Reduced to plain terms, the Government contends that in order to secure the reversal of an erroneous conviction of one offense, a defendant must surrender his valid defense of former jeopardy not only on that offense but also on a different offense for which he was not convicted and which was not involved in his appeal. Or stated in the terms of this case, he must be willing to barter his constitutional protection against a second prosecution for an offense punishable by death as the price of a successful appeal from an erroneous conviction of another offense for which he has been sentenced to five to twenty years' imprisonment. As the Court of Appeals said in its first opinion in this case, a defendant faced with such a "choice" takes a "desperate chance" in securing the reversal of the erroneous conviction. The law should not, and in our judgment does not, place the defendant in such an incredible dilemma. Conditioning an

> appeal of one offense on a coerced surrender of a valid plea of former jeopardy on another offense exacts a forfeiture in plain conflict with the constitutional bar against double jeopardy.

It is submitted that the same logic and the same reasoning should apply to the waiver doctrine. The Supreme Court felt it ridiculous that a defendant had to elect whether to take an appeal and seek to rectify an error on the part of the Trial Judge, or waive another important right, in the Green case, the constitutional protection against double jeopardy. Analytically, the Defendant in the instant case was faced with the same choice. The waiver doctrine states that he must "choose" between "waiving" his right to review of the error of the Trail Court or giving up his basic constitutional right to offer a defense.

Finally, the Defendant would direct the Court's attention to the rationale most often offered by courts in invoking the waiver doctrine. The waiver doctrine has been justified by saying that the error of the trial court was rendered "harmless" by subsequent evidence provided by the defense. People v. Crane, 34 Cal. App. 760, 168 P. 1055. It is submitted, as previously argued, that such an error can only be considered "harmless", if violation of the specific language and the obvious purpose of Rule 29 (a) on the part of the trial courts is considered "harmless".

Other courts have defended the waiver doctrine on the grounds that the Defendant "voluntarily" offered his proof. Leyer v. U.S., 183 Fed. 2d 102. This "voluntary" decision on the part of a defendant was urged by the Government and denounced by the Supreme Court in Green v. U.S., Id. Any defendant must realize that if he rests without introducing any evidence whatsoever that he will in all probability be convicted by the jury. The waiver doctrine forces the defendant to make an election, an election that Rule 29 in its express terms and obvious purpose protects him from having to make. To say that a defendant "voluntarily" exposes himself to the risk of establishing the Government's otherwise insufficient case would appear patently absurd.

CONCLUSION

By reason of the errors above cited, the Judgment of the United States District Court for the District of Vermont should be reversed. Judgment should be entered for the Defendant on the grounds that the District Court should have granted the Defendant's Motion for Judgment of Acquittal at the close of the Government's case, or, the case against the Defendant should be remanded for a new trial because of the Trial Court's error in partially instructing a verdict of guilty.

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Defendant - Appellant

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee	)	
v.	)	Docket No. 74-1029
JOHN P. CLEARY, Defendant-Appellant	)	

CERTIFICATE OF SERVICE

I do hereby certify that on the 12 day of March, 1974, I made service of the BRIEF FOR THE APPELLANT upon the UNITED STATES OF AMERICA, by mailing two copies of the same to its attorney of record, George W. F. Cook, United States Attorney, Federal Courthouse, Rutland, Vermont.

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